83 - 1375

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GLORIA D. AKIN AND
TED M. AKIN, PETITIONERS

V.

GEORGE L. DAHL, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners, pro se,

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

QUESTIONS PRESENTED

1. Whether there is a penalty and chill on free expression and the right of access to the courts in violation of the first and fourteenth amendments where a state applies common law rules relating to malicious prosecution to determine that lack of probable cause may be based on a mere inference that a defendant did not make full and fair disclosure of facts known to the defendant in commencing guardianship and temporary hospitalization proceedings.

2. Whether there is a penalty and chill on protected speech in violation of the first and fourteenth amendments where a state holds a defendant liable for malicious prosecution without a specific finding that a defendant's speech was knowingly false or in reckless disregard of the truth.

3. Whether, in the circumstances of this case, there is a subsequent penalty resulting in a chill on the right of petition, a penalty for the exercise of the right of freedom of speech and a violation of due process where a state court awards actual and punitive damages in the amount of $1,190,000 in a common law malicious prosecution case arising from the commencement of statutorily governed guardianship and temporary hospitalization proceedings.

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MISCELLANEOUS

Opinions Below

Concerning the malicious prosecution case presented here for review on first and fourteenth amendment claims, the opinions below are Dahl v. Akin, 645 S.W. 2d 506 (Tex. Civ. App.-Amarillo 1982), 27 Tex. Sup. Ct. J. 23 (October 8, 1983), reh. den., November 23, 1983. In the opinion found at 645 S.W.2d 506, the Texas Court of Appeals also considered claims between the parties unrelated to malicious prosecution.

Concerning the guardianship proceedings underlying Respondent's action for malicious prosecution , the opinion below is In Re Guardianship of Dahl, 590 S.W. 2d 191 (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.).

Jurisdiction

This Petition asserts that the Texas Supreme Court enunciated common law rules relating to malicious prosecution that penalize Petitioners and chill future litigants in the right of access

to the courts and the right of free expression, and deny these Petitioners due process of law. Jurisdiction exists under 28 U.S.C. § 1257(c). Judgment by the Texas Supreme Court was rendered October 5, 1983, at 9:00 A.M. Timely motion for rehearing was denied November 23, 1983. This Petition is filed within 90 days thereof, since leave to file a second motion for rehearing was denied.

Constitutional Provisions

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. amend. I.

> All persons born or naturalized in the United States . and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

a. Procedural History; b. Nature And Circumstances Of The Alleged Malicious Prosecution.

a. Procedural History

The Dallas County District Court, Dallas, Texas, entered judgment on a jury verdict against these Petitioners. The verdict assessed actual and exemplary damages against the Petitioners for malicious prosecution. The amount was 1.19 million dollars, after remittitur. The Texas Court of Appeals and the Supreme Court of Texas affirmed.

In 1978, Respondent filed this lawsuit against Petitioners, who are his only daughter and her husband. Throughout the original and amended petitions, Respondent alleged that the Petitioners had used falsehoods to invoke temporary

hospitalization and guardianship proceedings against him. He specifically charged that Petitioners had brought the proceedings with words and acts that were knowingly false or that were said and done with reckless disregard for the truth concerning the Respondent's mental and physical health. He also alleged that they had conspired in the alleged malicious prosecution.

Petitioners' answer properly denied these and all allegations.

At trial, no issue was submitted to the jury concerning specific testimony or statements that were supposedly false. Nor was there an issue relating to the knowing falsity of any testimony or statements that were purportedly made with a purpose to wrongfully hospitalize and seek a guardianship for Respondent.

The jury was permitted to decide the issue of lack of probable cause, deciding it against Respondent's daughter. The jury likewise found that she

acted with malice. Although no issue was submitted concerning the lack of probable cause or a mens rea possessed by Respondent's son-in-law, the jury was allowed to conclude that a conspiracy existed and to assess exemplary damages against Respondent's son-in-law. The Petitioners were made jointly and severally liable.

In the trial court, Petitioners' counsel raised and argued numerous points establishing this Court's jurisdiction of this case, including the following:

(1) That the issue of probable cause should not be submitted to the jury (A 81),

(2) That a finding for Respondent would constitute a chill on the right of free access to the courts (A 82),

(3) That no evidence was introduced, nor a finding made, that Petitioners made less than honest and full disclosure in commencing the earlier

proceedings, and therefore that the jury findings relating to probable cause could not be sustained and that probable cause must be found as a matter of law (A 83),

(4) That certain jury findings including the findings of malice, and lack of probable cause, should be disregarded, and that the trial court erred in refusing one of Petitioners' requested instructions (A 88), and

(5) That a new trial should be granted on the basis of the improper entry of judgment. (A 90).

Among numerous arguments to the Court of Appeals, Petitioners' briefs and motion for rehearing contended the following points which give this Court jurisdiction of this case:

(1) That the right of access to the courts was involved (A 93),

(2) That without evidence and a finding that Petitioners made less than honest and full disclosure in commencing

the earlier proceedings, the finding of a lack of probable cause could not be sustained and probable cause was established as a matter of law (A 95), and

(3) That on rehearing, the Court of Appeals' opinion had a chilling effect on the right of petition as gives rise to the right of access to the courts (A 98).

All arguments in the form of points of error, were preserved and presented to the Texas Supreme Court. Petitioners submitted a separate brief detailing the law concerning probable cause. In the Texas Supreme Court Petitioners raised the following points establishing federal jurisdiction:

(1) That the decision resulted in a chill on the use of the courts (A 99),

(2) That probable cause existed as a matter of law and, in light of Respondent's failure to offer any proof to show that Petitioners had made

falsehoods of any sort in commencing the prior proceedings and that record failed to support the finding of lack of probable cause (A105), and

(3) That on rehearing, the Texas Supreme Court improperly used a negligence standard to determine lack of probable cause (A110).

In its analysis, the Texas Supreme Court relied in part on an opinion of this Honorable Court, Wheeler v. Nesbitt, 29 How. 544 (1860), which requires a different application than that applied by the state court below.

Finally, the Texas Supreme Court rendered an unexpected interpretation and application of state law, effectively reversing prior law of malicious prosecution in the State of Texas.

b. The Nature And Circumstances Of The Alleged Malicious Prosecution.

Outlined below are the material facts leading to the guardianship and temporary hospitalization proceedings

commenced on Respondent's behalf, in support of Petitioners' assertions that their first amendment rights have been abridged. References made below are to the record unless preceded by an A, which is a reference to the Appendix.

Respondent Dahl was born in 1894 (379). He married Lille E. Dahl in 1921 (380). In 1932, they hired Clara Thomas to be their housekeeper (1493). She was a good and trusted employee who became part of the family over the years (455-456).

Petitioner Gloria Dahl Akin was born in 1934 (382). She would be the only child of Respondent and Lille E. Dahl (382).

Respondent and his wife sent their daughter to well-known private schools in Dallas (388). He would bring her beautiful gifts from his trips abroad (968, 973). He cared about who she dated, once opposing a boyfriend who was of another religion (744). He always

loved and cared about her very much (435, 449).

In 1951, Dr. Haynes Harville became Respondent's personal physician (1638).

Respondent assisted Petitioners, who married in 1954, even employing his son-in-law for six to nine months to help him get started (384, 1089) and contributing to his political campaigns (390, 1099). In the late 1950's Respondent gave Petitioners many furnishings for their house (e.g. 970-1100). In the early 1960's, Respondent and Petitioners were very close (1092). Lille Dahl died in the late 1950's.

Respondent and Petitioners maintained their close relationship in the 1960's and early 1970's (1092). They took trips together (1077, 1977). His daughter called or went by his office nearly every day (508, 633, 1443, 1463, 1442). He continued to give her gifts, even against her protests (1483). Petitioners named their only son for Respondent (725). Respondent would

spend every Sunday with Petitioners (432).

In 1966, Respondent suffered a stroke (1700).

From the early 1970's until 1978 when the guardianship and temporary hospitalization proceedings were filed, Respondent had a history of medical and behavioral problems associated with severe arteriosclerosis. The records of Dr. Harville, Respondent's doctor for twenty years, revealed that Dr. Harville received calls in 1971 and 1972 from Respondent's secretary and from his son-in-law. They reported that Respondent was becoming cantankerous; that his memory was faltering to the extent that he would forget what he had said or done from one moment to the next; that he had upbraided people and had run off customers; that he would throw temper tantrums and became accusatory of his staff; that he became very hard to please, which was unlike him; that he was living in the

past; and that key people in Respondent's firm were leaving after twenty years' tenure (1685, 1589, 1591).

In 1972 and '73, Dr. Harville recorded that Respondent had quit taking medication prescribed a year earlier (1691), that Respondent had great difficulty with balance and with progressive weakness and clumsiness in his left arm and leg (1693-1694). Respondent's daughter had informed Dr. Harville that Respondent dragged his leg (1693-1694). Dr. Harville attributed Respondent's problems to continued hardening of the arteries, disturbing Respondent's brain circulation in the portion controlling his left side (1697-1700).

In January 1973, Dr. Harville diagnosed Respondent's arteriosclerosis as critical, having progressed far enough to produce another stroke (1701).

In 1974, Dr. Harville prescribed medication that Respondent understood he

should take if he wanted "to continue to live." (506). He was to take it indefinitely (1719). The medication was a vessel dialator designed to increase circulation in Respondent's brain (1709-1712, 1719).

His daughter was concerned for her father's health (633, 735, 741, 744, 746, 508, 509, 1463). She wanted to take care of him (743, 746). She always made sure he was taking his medicine (506-509), although she did not know medically what the medicine performed (833). She helped all she could (1463). Clara Thomas, Respondent's housekeeper since 1932, saw that Respondent took his medication four times a day (1496). She would give him a walking cane to use (1497).

Respondent last saw Dr. Harville, his doctor for 25 years, in 1976 (1737). Respondent's daughter and Dr. Harville's office repeatedly tried to get Respondent to return to the office in the

months and years after that, but had no success (508).

Respondent's condition progressively worsened in 1977 and 1978. His usual smart attire declined (835, 1497). He became repetitious (783). He adamantly refused to employ a driver, although he had had several minor accidents (784). He began smoking again although he had quit years earlier (784). He would burn holes in his suits, causing his daughter to fear that he would set fire to his apartment.

In 1977 he sold holdings that he had always told his daughter and son-in-law to retain (758).

Sometime in 1977 or 1978, Respondent stopped taking the medication Dr. Harville had prescribed for him to take indefinitely (410, 506). He began to withdraw from the family (731). For fifteen years his daughter had phoned him almost daily and the calls had always pleased him (509), but he began

to tell her they were harassing to him (508, 509, 950, 951). Always before his family would help him walk because Respondent dragged his leg and they did not want him to fall (756). At this time, however, he was shunning their help (756). He refused a cane (756). When his daughter would kiss him hello or goodbye, he would pull away (756). He would become upset over matters that normally would not upset him (852).

In the first or second week of March 1978, Respondent told his daughter that he would marry on April 1, 1978 (393, 839). The woman was near the age of Respondent's daughter and his daughter questioned the woman's motives, in light of Respondent's wealth, age and poor physical condition (743). His daughter also felt that it was uncharacteristic of her father to be attracted to a woman with a background such as that of his fiance (756). His daughter had disapproved of the relationship

although they had no real fights about it (760, 852). Sometime in March, Respondent entered a hospital to have surgery (412, 497), but did not tell his daughter. It caused her to worry when she could not reach him by phone at his office (802, 497).

Respondent had told his daughter that he was going to fire Clara Thomas after he married (729, 833). He told his son-in-law, however, that he was not going to fire Clara, that what Clara did was "Clara's affair" (729, 730). In the end, Clara Thomas left her job of forty-six years, stating that she had loved Lille E. Dahl and did not want to work for a new Mrs. Dahl (496). Before she left, Clara mentioned to Respondent that some of Lille E. Dahl's china and silver should be given to Respondent's grandchildren (457). He agreed with her (458). Later, Respondent accused Clara of stealing the china and silver (1504, 420, 458). When she left his employ,

Respondent demanded back the automobile he had given Clara 10 years earlier (461, 1504).

Respondent's daughter asked her husband to talk to a lawyer about dealing with her father's behavior (726). She wanted him to be examined, since he still refused to see Dr. Harville (739, 742). On March 17, 1978, Respondent's son-in-law contacted a probate lawyer experienced in guardianship proceedings (711). Petitioners conversed with him frequently (712).

On March 27, 1978, Respondent's daughter met with Dr. Harville, concerning possible guardianship proceedings (1740). Respondent's daughter had been in frequent contact with Dr. Harville over a period of ten years concerning her father's health (1738). She told Dr. Harville about Respondent's short temper, irritability, poor driving habits, impending marriage to a younger woman, uncharacteristic business

decisions, treatment and attitude toward Clara Thomas and his pulling back from his daughter's affection and assistance (756, 1739, 1742). Dr. Harville agreed to assist in guardianship proceedings (1740).

The next day, pursuant to Tex. Prob. Code Ann. § 111 (Vernon 1980), (A B-3) attorneys for Respondent's daughter filed and obtained a hearing upon an application for temporary guardianship, including a request for authority to admit Respondent to a hospital for examination (811-816, 1166). Respondent testified under oath that she was extremely concerned for her father's well-being, that his manner had changed in the preceding months from what she had been used to previously, that his dress was inappropriate, that his language was foul, that he was not making sense at all times, that she did not understand his reasons for firing his housekeeper, that his driving habits

were bad, that he was not taking his medication and that he refused to accept help from those closest to him (1171). Judge Jackson, who presided over the guardianship proceeding, requested testimony from Dr. Harville prior to entering an order of temporary guardianship and he took the testimony of Respondent's daughter under advisement (1174).

There was a lapse of time before Respondent's daughter completed the statutory requirements for guardianship (951). There was no room at Presbyterian Hospital, where she wanted him to be examined (823). She vacillated on whether to go forward (951). She did not want to face the fact that she had to do something, but yet her father was moving further and further away from the family; he was not the same person she had known (951).

On April 2, 1978, in order to explain why she had not attended,

Respondent called Dr. Elliot, who her father said would perform Respondent's marriage ceremony on April 1, 1978, at 2:00 P.M. She learned for the first time that her father's marriage did not take place the day before (838).

Sometime between March 28, 1978, and April 20, 1978, Dr. Harville gave his sworn testimony to Judge Jackson concerning the guardianship application (1175). Dr. Harville openly testified that he had not seen Respondent recently (1177). The doctor, however, knew Respondent well, had treated him on numerous occasions, and considered him a friend as well as a patient (1176). He gave a short medical summary of Respondent's condition, then testified that in his opinion Respondent needed a guardian to protect his interests (1177). Judge Jackson recalled that Respondent's daughter had had a tremendous concern that people had taken or would take financial advantage of her father

(1181). The judge also felt that Dr. Harville had a true interest in Respondent (1177), that Dr. Harville's testimony was not based entirely upon the information provided by Respondent's daughter (1177).

On April 20, 1978, Judge Jackson entered an order of temporary guardianship, contingent upon the filing of oath and bond. Respondent's daughter still hesitated in completing the statutory procedures, filing her oath the next day but not her bond (1245).

On April 24, 1978, Respondent's son-in-law informally inquired of Probate Judge Joseph Ashmore about the procedural matters regarding temporary hospitalization (1207). Akin told Judge Ashmore about his wife's concern for Respondent, especially that Respondent was not taking his medicine (1207-1208). At the end of the conversation, he told Judge Ashmore that the family would

discuss the matter and decide what to do (1208).

On April 24, 1978, Respondent invited his daughter, his oldest granddaughter and his son-in-law to his apartment (952). He had prepared a bitter, handwritten memorandum that he read aloud to them, beginning with the words "I speak to you for the last time" (401). After that, Respondent's granddaughter was in tears (953). His daughter could not believe what he was saying but she knew something was definitely wrong (952). The event caused her to call the probate lawyer that evening to tell him to go forward immediately with the court proceedings so that Respondent could be examined (953).

On April 25, 1978, Respondent's daughter and son-in-law went to the courthouse to seek Respondent's temporary emergency hospitalization, completing forms for approval by Judge Ashmore,

who presided over proceedings relating to mental illness (1209) (A). The application for hospitalization is accompanied by a form affidavit prepared by the Mental Illness Department (1759). If a doctor later signs a certificate of mental illness after examination, the patient will be held subject to a fourteen day order of protective custody until the patient can be examined by an additional physician (1759). The proceedings are based on affidavit and no formal hearings take place as a rule (1226).

Before Judge Ashmore ordered Respondent's hospitalization, Respondent's daughter answered the judge's questions concerning the kind of danger Respondent's condition posed to Respondent and to others (1211). She also told Judge Ashmore that she was trying to arrange hospitalization for Respondent at Presbyterian Hospital, a common practice in mental illness proceedings

where families have the wherewithal to pay for the treatment there (1212). After the application was filed, Judge Ashmore phoned a doctor at Presbyterian Hospital to confirm that Respondent's condition was life-threatening if he did not receive his medication (1221).

On April 25, 1978, Judge Ashmore signed the warrant for Respondent's arrest and delivery to the emergency room at Presbyterian Hospital, and on April 26, 1978, at 9:30 a.m., the warrant was executed and Respondent was taken to Presbyterian Hospital (Plaintiffs' Exhibit 22).

On April 26, 1978, at 11:22 a.m., Respondent's daughter posted her bond to become Respondent's temporary guardian (Plaintiffs' Exhibit 37).

On April 26, 1978, Dr. Thomas A. Woods examined Respondent (1626), spending about one-half hour with Respondent on April 26. Dr. Woods was "satisfied at that time that his case

sounded serious...and that, in fact, he did need further investigation of this." (1634). Dr. Wood completed Form 633, stating under oath his diagnosis: that Respondent suffered from "organic brain syndrome with psychosis" (Defendant's Exhibit 12). He further stated under oath:

> I am of the opinion that patient is mentally ill and I am further of the opinion that patient requires observation and treatment in a mental hospital. That I am of the opinion that patient does require hospitalization in a mental hospital. That I am of the opinion that patient is likely because of his mental illness to cause injury to himself or others if not immediately restrained." (Defendant's Exhibit 12).

He testified at trial that all of the symptoms that had been recorded by Dr. Harville, by Respondent's employees, and by his family were consistent with his diagnosis made on the day that Respondent was hospitalized (1647).

Also on April 26, 1978, Dr. Haynes Harville performed a physical examination (1744). Dr. Harville purposely avoided making a mental evaluation, leaving it to the other psychiatric and neurological consultants who he believed would be better able and better trained to evaluate Respondent's mental competency in a legal way. Dr. Woods had access to Dr. Harville medical records concerning Respondent's history of arteriosclerosis (1631). In addition, Respondent received certain medical tests including an electroencephologram and a CAT scan (computerized axial tomography) (1631-1632). The CAT scan revealed that Respondent had suffered "an atrophy in the brain, that is, a shrinking in the overall size of the tissue" (1632). His symptoms were thus diagnosed as being caused by the organic changes

in his brain, "organic" referring to the fact "that the illness is produced by the change in the organ itself, rather than strictly a mental illness produced within a healthy tissue" (1632).

On April 27, 1978, pursuant to the statutes of the State of Texas, an order of protective custody was issued by the Probate Court (1763, Plaintiff's Exhibit 29). Judge Ashmore testified in the trial below that regardless of the warrant, if the examining physician does not feel that the patient is mentally ill, then the patient is released without further order of the court and an order of protective custody would not issue (1763-1766).

On May 8, 1978, Respondent was examined by a second doctor, James P. Grigson, M.D., who on that date stated on Form 633, under oath to the Probate

Court, that Respondent suffered from "chronic organic brain syndrome with impairment in reasoning and judgment" (Defendant's Exhibit 11), and that the condition was secondary to arteriosclerosis (1539). Dr. Grigson had examined Respondent on April 26 and April 29, as well as on May 8 when he completed the affidavit. Dr. Grigson's certificate laid the predicate for Respondent's 90-day commitment (1772). On May 5 and May 9, 1978 Respondent was examined by Dr. Byron Howard in the psychiatric unit of Presbyterian Hospital (1790). He reviewed the records, talked to the family, talked to the nurses and the aides in the psychiatric unit and visited with Respondent. He diagnosed that Respondent suffered from "organic brain syndrome, moderate, secondary to cerebral arteriosclerosis" (1792). He arrived at this diagnosis by taking a mental status examination as part of his conversation and contact with

Respondent, took a detailed history from Respondent and from the family (1793).

On May 17, 1978, Judge Joseph E. Ashmore signed and entered an Order of Dismissal (Plaintiffs' Exhibit 28), based on Dr. Woods' testimony that Respondent no longer represented a danger to himself (1780).

Judge Ashmore however had released Respondent to his attorney and to the protective custody of his employees a week or four or five days before he dismissed the case (1230). Pertaining to Respondent's early release, Judge Ashmore testified that the early release was based on assurances by Respondent's employees and his attorney that they would guard against Respondent driving a car, there being a possible danger to the public as well as to Respondent (1228-1229).

During the time Respondent was hospitalized he was permitted to go to

Rotary meetings and receive visitors, including his attorneys (504, 508).

REASONS FOR GRANTING THE WRIT

The decision of the Texas Supreme Court in this case gives a scope and application to the common law doctrine of malicious prosecution so broad that it violates Petitioners' first amendment rights of petition and free expression, and chills the exercise of these rights in future litigants.

If the judgment stands, its impact will be grave -- not only in its general impact of inhibiting the exercise of the right of petition to seek redress of grievances and to report possible criminal activities, but especially in its specific focus of penalizing the exercise of first amendment rights in statutorily governed mental health proceedings which were enacted to protect and care for those citizens who are unable to do so themselves. These issues are momentous and urgently call

for the consideration and determination of this Court.

The right of access to the courts and the right of free expression are involved in any malicious prosecution action because of an inherent conceptual conflict. The right of access to the courts, and to free speech, are constitutional guarantees, yet the doctrine of malicious prosecution is a punishment for the abuse of those rights. This conflict is heightened in Petitioners' case, where they commenced guardianship and temporary hospitalization proceedings pursuant to enactment of the Texas State Legislature, in which the state, in an important exercise of its power of parens patriae, not only protects the mentally ill from themselves, but also the general public from those so afflicted.

The strongest protection against a penalty or chill on citizens who would instigate criminal or mental health

proceedings, or who would file a civil action, is the element of probable cause. All of Petitioners' claims fundamentally arise from the state courts' erroneous treatment of this essential element of malicious prosecution.

The errors relating to probable cause fall into two categories. First, some errors individually punished and chilled protected speech and free access. A second group of errors were not constitutionally significant taken alone but repugnant to the first amendment when combined with others.

In the first category, it was found in the trial courts that Petitioners lacked probable court to believe that Respondent was incompetent or mentally ill. The finding was upheld on appeal upon a mere implication that Petitioners failed to make full and honest disclosure to the probate courts responsible for such proceedings. No specific

finding that Petitioners' speech was knowingly false was made, which rendered the final determination of lack of probable cause constitutionally infirm in and of itself.

Additionally, The Texas Supreme Court held that liability may attach to Petitioners on the basis of evidence they knew or should have known at the time the guardianship and temporary hospitalization proceedings were commenced. The "should have known" standard is unknown in the common law of malicious prosecution and far too elusive for a cause of action intertwining with fundamental rights and laced with stringent requirements at common law. Just as the reasonable person standard has been rejected in other first amendment contexts, the 'should have known' standard must be rejected here.

The second category of errors exacerberated or perhaps led to the

first category of errors. Certainly the errors are all interrelated, making it a compelling case for this Court's independent examination of the record, due to the first amendment principles at stake. The second category includes the fact that probable cause was treated as a pure question of fact, and not as a pure question of law or as a mixed question of fact and law. In addition, the burden of proof was shifted to Petitioners, who were defendants below, forcing Petitioners to prove probable cause, instead of making Respondent prove the lack thereof. Moreover, evidence of Respondent's competency was permitted to constitute evidence of lack of probable cause. And finally, an inference of bad motives was permitted to constitute some evidence of a lack of probable cause, where such evidence of motives should have been permitted only to show malice, and not to show a lack of probable cause.

That such errors supported an award of draconian damages is constitutionally impermissible, and such a result mandates consideration of this case.

A. The inherent conflict. The opinion below strikes at the core of a tension that has existed through the course of this country's jurisprudence. The law of malicious prosecution protects individuals from groundless criminal charges and from vexatious and frivolous civil actions. By its very nature, such common law doctrine conflicts with the exercise of the first amendment rights of petition and free expression as embodied in the fourteenth amendment.

It is precisely this conflict which has long caused malicious prosecution actions to be unfavored by the law as against public policy. See Stewart v. Sonneborn, 98 U.S. 187, 198 (1879); Reed v. Lindley, 240 S.W. 348, 351 (Tex. Civ. App.-Fort Worth 1911, no writ). Damages in malicious prosecution cases have

never been assessed with the readiness of suits for being hit by a defective train. Texas courts have held:

> The reason for the rule not favoring actions for malicious prosecution...is that a litigant should be entitled to have his rights determined without the risk of being sued and having to respond in damages for seeking to enforce his rights, as free access to the courts is provided for the administration of the law of the land.

Lancaster &. Love, Inc. v. Mueller Co., 310 S.W.2d 659, 653 (Tex. Civ. App.-Dallas 1958, writ ref'd.).

It is well established that the right of access to the courts is an aspect of and is protected by the first amendment right to petition the Government for the redress of grievances, and the right to freedom of speech. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-511 (1972). California Motor Transport was an antitrust case dealing with the Noerr-Pennington doctrine, which had its

genesis in the cases of Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965). These cases dealt with the question of whether the exercise of the first amendment right of petition could constitute a violation of the Sherman and Clayton Acts. In utilizing the Noerr-Pennington doctrine to hold that the antitrust laws do not prohibit the filing of a lawsuit, this Court held that one cannot lightly impute an intent to invade these first amendment freedoms. 404 U.S. 510. Indeed, an aggrieved party should not lightly be deprived of the constitutional right to petition the courts for relief. The instant case so chills that right so as to virtually constitute such a deprivation. Id.

The extent of first amendment protection for access to the courts is not invariant to the nature of the lawsuit. Grip-Pak, Inc. v. Illinois

Tool Works, Inc., 694 F. 2d 466, 471 (7th Cir. 1982). In NAACP v. Button, 371 U.S. 415 (1963), the National Association for the Advancement of Colored People exercised its right of petition to use constitutional litigation to break down official segregation. Id. at 429-430. Indeed, such exercise of the right of access to the courts in an attempt to protect one's civil rights should entitle that litigant to more protection than, for example, a competitor to use the right of access for anticompetitive reasons, as is protected by the Noerr-Pennington doctrine. Grip-Pak, Inc. v. Illinois Tool Works, Inc., supra. The instant case furnishes this court with a situation as compelling, if not more compelling, than the Button case. At issue is the exercise of the right to petition the state to assume its duty to care for those who are unable to care for themselves, and who might injure themselves or others

due to mental illness. This is a compelling state interest mandating greater first amendment protection against malicious prosecution actions for the institution of such proceedings, particularly because the speech attacked in the malicious prosecution action is specifically provided for by the state legislature.

B. Reliance On Texas Mental Health Statutes Is Entitled To First Amendment Protection.

In 1978 and today, by Texas Statute, "any adult person" may commence temporary hospitalization proceedings by filing a sworn statement "upon information and belief" stating among other prerequisites, that a proposed patient is mentally ill. TEX. REV. CIV. STAT. ANN. art. 5547-31 (Vernon Supp. 1983). In addition, "a credible person" may represent in writing that another person is mentally ill and likely to cause injury to himself or others if not

immediately restrained. Upon obtaining a warrant, a peace officer or a health officer may take the proposed patient to a hospital facility. TEX. REV. CIV. STAT. ANN. art. 5547-27(a) (Vernon Supp. 1983). "Such person admitted upon such warrant may be detained in custody for a period not to exceed 24 hours, unless a further written order is obtained from the County Court or Probate Court of such county, ordering further detention." Id.

Respondent's daughter relied on Article 5547-27 and Article 5547-31 when she sought the Respondent's hospitalization. While the temporary hospitalization statute permits citizens to file affidavits based on "information and belief" Respondent's daughter has been held liable for those very statements.

It is as much the policy of the law to care for its weaker citizens as it is the policy to encourage criminals to be brought to justice and to encourage

settlement of civil disputes through civilized procedures. Citizens of the state have a legitimate interest under the power of parens patriae to provide care for those citizens who are unable because of emotional disorders to care for themselves; "the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." Addington v. Texas, 441 U.S. 418, 426 (1979) (holding that Texas procedures for indefinite commitment require proof by clear and convincing evidence). Parens patriae is a power inherent in the supreme power of every state and often necessary to be exercised in the interest of humanity. See generally Note, Civil Commitment of the Mentally Ill, 87 Harv. L. R. 1190, 1207 (1974).

That a compelling state interest supports to exercise on the first amendment rights exercised in this case renders the chilling of first amendment

rights more grave, and compels reversal of the state courts' ruling.

C. Protecting The Right Of Petition With Probable Cause.

The element of probable cause is the single protection to both to a citizen's right of access to the courts, and his right to protected speech in proceedings before those courts. The separation of legitimate from illegitimate speech calls for sensitive tools. Speiser v. Randall, 357 U.S. 513, 525 (1958). Properly applied, the common law rules of probable cause constitute one of the oldest, most "sensitive tools" developed to protect pure speech in making statements to authorities, and to protect right of access to the courts in civil matters. There were no sensitive tools applied below, however, when the Texas courts misperceived the importance on the rules of probable cause.

In a malicious prosecution action, the element of want of probable cause is an independent factor which must be proved by the Plaintiff separate and apart from any other element. Biering v. First National Bank, 69 Tex. 599, 7 S.W. 90, 92 (1888); Griffin v. Chubb, 7 Tex. 603, 612 (1852). The mere fact that there is probable cause is a complete defense, regardless of any other evidence or circumstances. Id. See also Lloyd v. Almeda State Bank, 346 S.W.2d 947, 952 (Tex. Civ. App.-Waco 1961, writ ref'd n.r.e.). Further, the want of probable cause can never be inferred from proofs of any malice, even the most express malice, because probable cause is independent of malicious motive. Biering v. First National Bank, supra; Griffin v. Chubb, supra at 615; RESTATEMENT (SECOND) OF TORTS 2d § 669A (1971).

However, the state courts in this case apparently ignored this well established tenet of law.

The Texas Supreme Court held that it is proper to consider the motives of a litigant in determining the question of probable cause. 27 Tex. Sup. Ct. J. 23, 25 ("jury properly considered all of the evidence surrounding the motivation, beliefs, and faith of the prosecutor on this action"). Therefore, the state courts have made a grave error in applying evidence of motives to the want of probable cause, instead of properly considering them as evidence of malice.

Analogous to the instant case is the situation which confronted this Court in Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 51 U.S.L.W. 4636 (U.S. May 31, 1983). In holding that prosecuting an unmeritorious lawsuit for a retaliatory purpose was not an unfair labor practice, this Court construed the antitrust laws as

not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent on purpose in doing so. Id. at 4639. In the instant case, not only did the state court erroneously infer lack of probable cause from evidence relating to malice, but compounded the error by inferring malice from want of probable cause.

The Texas Supreme Court further held that "the burden of proof shifts to the defendant to offer independent proof of probable cause." 27 Tex. S. Ct. J. 23, 24. However, the common law rule is that the onus probandi is on the plaintiff "to prove affirmatively...that the defendant had no reasonable ground for commencing the prosecution." Wheeler v. Nesbitt, 29 How. 544, 541 (1860). See also Bekkeland v. Lyons 96 Tex. 255, 72 S.W. 56, 57-58 (1903).

In addition, the Texas Supreme Court and the Court of Appeals treated probable cause, or the lack of it, as a

mere question of fact, 27 Tex. S. Ct. J. at 24, opposite to the common law. "What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case, is a pure question of fact. The former is exclusively for the court, the latter for the jury." Landa v. Obert, 45 Tex. 539, 543 (1876). See also Stewart v. Sonneborn, 98 U.S. 187, 198 (1879).

When the state courts reviewed probable cause in this case, it was treated as any other fact question. Therefore, both appellate courts reviewed the evidence by a test that considers only evidence tending to support the jury finding of lack of probable cause. See 645 S.W.2d at 513, n.4. As a result, all of the uncontroverted testimony was disregarded concerning Respondent's behavior, physical condition, medical history and his diagnosis by four attending physicians. In the

Texas Supreme Court, the sworn testimony and affidavits of physicians who diagnosed Respondent as being mentally ill was disregarded for all purposes, and was not even considered for showing the reasonableness of Petitioners' beliefs. See 27 Tex. S. Ct. J. at 24.

Finally, the Texas Supreme Court held that a jury may determine lack of probable cause by considering "all evidence which the prosecutor of the action knew or should have known relative to the condition of the plaintiff and upon which evidence the prosecutor based or should have based his action." Id. at 25. This clearly is erroneous. See Griffin v. Chubb, supra at 615. At common law, probable cause is determined by the existence of such facts and circumstances that would excite belief in a reasonable mind, acting on facts known to the initiator. Wheeler v. Nesbitt, supra. Therefore, reasonableness in the instant case turns on facts

known by Petitioners. Indeed, the only thing it appears the Petitioners "should have known" was that a jury would find Respondent competent.

In other first amendment contexts, this Court has held that "[f]ear of guessing wrong must inevitably cause self-censorship and thus create the danger that the legitimate utterance will be deterred." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971). Where free access, free speech and reliance on state statutes are involved, a "should have known" standard is no less a deterrent to legitimate utterances. Imposing liability for acting on vague facts and circumstances Respondent's daughter did not know but should have known is "simply inconsistent" with free access and the protected speech involved with relying on statutory procedures. See Id. Petitioners should not be held liable for lawful reliance on statutes.

Where a finding of lack of probable cause purports to rest on a defendant's material falsehoods, misrepresentations, or concealment of material facts, there must be evidence and findings specifying the false statements, and indicating that they were material to the prior proceeding and that they were knowingly false or in reckless disregard for the truth. See Pickering Board of Education, 391 U.S. 563 (1968); New York Times Co. v. Sullivan, 376 U.S. 254, 278 (1964).

At common law, "[i]n order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear...that the information furnished by him was known to be false." RESTATEMENT 2d TORTS § 653 comment (g) (1977) (emphasis added).

However, in the instant case, there was no finding of actual falsity or reckless disregard for the truth in

support of the finding that Petitioners maliciously prosecuted Respondent. Nevertheless, the state courts awarded damages based on malicious prosecution with even less proof than is required in libel cases. In Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983), the Eleventh Circuit held that the first amendment requires that the burden of proof for malicious prosecution actions should be the same as that required in libel actions. Id. at 1184. In doing so, the Cate court drew an analogy to the decision of New York Times Co. v. Sullivan, supra by using the same distinctions regarding the burden of proof and malicious prosecution actions as this court drew regarding libel actions in the New York Times case. Therefore, malicious prosecution, like libel, obscenity, contempt, advocacy of violence, disorderly conduct or any other possibly defensible basis for suppressing speech or petition, must be

defined and judged by standards which are not repugnant to the Constitution. The state courts' rulings constitute an impermissible penalty for exercise of first amendment rights by Petitioners and future litigants.

D. The Award Of Punitive Damages In The Amount Of $1,190,000.00 Constitutes A Subsequent Punishment For The Exercise Of First Amendment Rights.

The imposition of draconian damages by a state court for the legitimate exercise of first amendment rights must not be tolerated by this court, and constitutes, in itself, a compelling reason for review. Subsequent punishments can present a substantial infringement of first amendment rights. Cate v. Oldham, supra at 1186. In New York Times v. Sullivan, supra, this Court, in reviewing an award of $500,000.00 in "presumed" damages, recognized that "[t]he fear of damage awards under a

rule such as that invoked by the [state] courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute". Id. at 277. As Mr. Justice Brandeis said, concurring in Whitney v. California, 274 U.S. 357 (1927), a "police measure may be unconstitutional merely because the remedy, although effective as a means of protection, is unduly harsh or oppressive". Id. Indeed, the power to regulate must be exercised so as not, in attaining a permissible end, unduly to infringe on a protected freedom. Cantwell v. Connecticut, 310 U.S. 296, 304, 308 (1940). Any judgment of this magnitude, imposed routinely on the facts contained in the instant case and sustained no less routinely on appeal will necessarily have a repressive influence which will penalize and chill the exercise of first amendment rights. In the instant case the common law doctrine of malicious

prosecution must confront, and be subordinated to, the Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I do certify that a true and correct copy of the foregoing has been sent to Bickle & Case, attorneys for Respondent, 4300 Thanksgiving Tower, Dallas, Texas 75201, by depositing in the United States Post Office mailbox with first class postage.